TABLE OF CONTENTS

PAGE

Introductory Statement 1

I. PROCEDURE BEFORE THE INDUSTRY COMMITTEE AND THE ADMINISTRATOR 2

A. The Definition of the Textile Industry 2

B. Composition of the Industry Committee 4

C. The Procedure Before the Industry Committee 8

1. *Committee was Required to Proceed According to Law* 8

2. *Notice and Hearing* 12

3. *Vote of the Committee* 14

II. THE ADMINISTRATOR'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE 15

A. Substantial Evidence and the Rules of Evidence 15

B. Judicial Notice 21

C. Finding that there would be no Substantial Curtailment of Employment 24

1. *Small Mills* 25

2. *Regional Classifications* 29

3. *Experience under the Act* 31

D. Administrator's Finding that Classifications are not Required, not Supported by Substantial Evidence 32

III. THE FAIR LABOR STANDARDS ACT UNCONSTITUTIONAL 36

A. Interstate Commerce 36

B. Due Process of Law 37

TABLE OF CASES

PAGE

Arizona v. California, 283 U. S. 423; 75 L. Ed. 1154 23

Brown v. Piper, 91 U. S. 37; 23 L. Ed. 200 21

Galveston Electric Co. v. Galveston, 258 U. S. 388; 66 L. Ed. 678 23

Hammer v. Dagenhart, 247 U. S. 251; 62 L. Ed. 1104 36

Interstate Commerce Commission v. Louisville and N. R. Co., 227 U. S. 88 24

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; 79 L. Ed. 1593 37

Morgan v. United States, 298 U. S. 468; 304 U. S. 1 38

National Labor Relations Board v. Fainblatt, 306 U. S. 601; 83 L. Ed. 1014 23

National Labor Relations Board v. Mackay Radio and Telegraph Co., 304 U. S. 333; 82 L. Ed. 1381 38

National Labor Relations Board v. Pennsylvania G. Lines, 303 U. S. 261; 82 L. Ed. 831 22

New England Division Cases, 261 U. S. 184 20

New York ex rel. Pennsylvania Ry. Co. v. Knight, 192 U. S. 21; 48 L. Ed. 325 36

Ohio Bell Telephone Co. v. Public Utilities Com., 301 U. S. 292; 81 L. Ed. 1093 23

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90; 83 L. Ed. 68 36

Rochester Telephone Corp. v. United States, 307 U. S. 125 11

Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453; 82 L. Ed. 954 37

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 24

TABLE OF CASES (Continued)

PAGE

Tagg Bros. and Morehead v. United States, 280 U. S. 420; 74 L. Ed. 524 11

United States v. Los Angeles and Salt Lake Ry Co., 273 U. S. 299 19

Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 515; 81 L. Ed. 789 22

West v. Chesapeake P. Teleph. Co., 295 U. S. 662; 79 L. Ed. 1640 22

IN THE

Supreme Court Of The United States

On Certiorari to the United States Circuit Court of Appeals
Fifth Circuit

No. 330

OCTOBER TERM, 1940

OPP COTTON MILLS, INC., ET AL,
Petitioners,

versus

ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR,
Respondent.

REPLY BRIEF FOR PETITIONERS

INTRODUCTORY STATEMENT

Petitioners' brief and Respondent's reply thereto demonstrate that there is little of conflict in their contentions as to what was before the Administrator when the wage order under review was adopted. They do demonstrate a wide divergence as to how this material was to be treated, its purpose and effect, and the conclusions and inferences to be drawn therefrom.

There was an imponderable array of statistical material in the record. Not one figure in that array demonstrated the correct solution of any issue raised by the Committee Report,

the Minority Report or the objections of Petitioners. There was an enormous amount of direct testimony which sought to answer these issues.

I

THE PROCEDURE BEFORE THE INDUSTRY COMMITTEE AND THE ADMINISTRATOR

A. The Definition of the Textile Industry.

Petitioners do not contend that the court can substitute its judgment for that of the Administrator. They do contend that the Administrator is bound to act according to law. They further contend that a wage order not made in accordance with the provisions of the Fair Labor Standards Act is ineffectual for want of Congressional authority for its adoption. Prejudice to any one adversely affected by such an order follows as a matter of course.

No one can contend that the Administrator could adopt a wage order without the intervention of a committee, or adopt one which was not recommended by a committee. If such an order were adopted, any employer required to raise his wages thereunder would clearly be prejudiced. In like manner, petitioners are prejudiced by an order based upon a committee recommendation, which grew out of an irregular proceeding in which the Administrator usurped the function of the committee in making classification by the device of exercising the function under the guise of defining the industry, and persuaded the committee not to establish classifications within these classifications by inducing it to believe that no one wanted them (R. 1087), and by keeping them occupied with considerations inferior in scope and effect to the primary statutory authority and duty invested in and imposed upon it.

Section 5 of the Fair Labor Standards Act requires the Administrator to appoint a committee for each industry. Section 8(a) provides:

> "With a view to carrying out the policy of this Act . . . the industry Committee shall from time to time recommend the minimum rate or rates of wages to be paid under Section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein."

Section 8(c) provides:

> "The Industry Committee for any industry shall recommend such reasonable classification within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rates . . ."

Instead of defining the textile industry in Administrative Order No. 1 and referring to Industry Committee No. 1 the question of classifications and minimum wages for that industry, the Administrator divided this work between two committees, their inter-relationship being demonstrated by their designation as "No. 1" and "No. 1-A".

The explanation for this procedure advanced by the Administrator is so at variance with the procedural steps actually taken that it may be disregarded. Its true explanation is to be found in the fact that the Cotton Textile Institute, through Dr. Murchison, was exercising a dominant influence over the entire proceedings (R. 1057, Br. 15-16-Note 3), and Dr. Murchison did not want classifications (R. 320).

If what the Administrator did in this instance is to be permitted in other industries, he may nullify the provisions of the Act placing the responsibility for classifications upon an industry committee. In the lumber industry, he may make separate classifications for hardwood, redwood, pine, and

spruce. Having made these classifications, he could attach to some of them such related industries as box factories, ply wood, wall board, and even paper boxes, since they compete with boxes made of lumber. Moreover, he could bring in picture frames, furniture, and ready cut houses, as evidenced by his inclusion of blankets, sheets, towels, and many other finished products, including lace, which is not a textile at all.

This is not a question of whether or not the court will substitute its judgment for that of the Administrator. The question is whether or not the Administrator, or this court, may substitute another judgment for that of Congress. Whatever considerations induced the Administrator to draw to himself the function of the committee, it must be ineffectual in this case. So far as we have been able to learn, the practice was not pursued by the administration after the adoption of this order, and the present Administrator finds no objection to allowing committees to perform their lawful function with respect to classifications.

B. Composition of the Industry Committee.

Petitioners have never contended that mathematical precision in apportionment of committee members was required under the Act. They have not contended that a wide discretion was not vested in the Administrator in his selection of the personnel of the committee. They have contended and do contend that the scope of discretion may not be projected in the opposite direction from that intended by the legislative authority and to the exclusion of the considerations which influenced the grant of discretionary power.

As previously pointed out (Br. 16), on a mathematical calculation based on the classifications made by the Administrator and the regional groups adopted by him, the South was entitled to 55% of the composite committee, whereas it was represented by less than 42%. That this 55%

is the minimum of representation to which the South was entitled under the most liberal interpretation of the expression "due regard" is demonstrated by the effect of the lack of representation of (1) mills in the South, (2) the cotton mills whose wage bills would be most increased, (3) non-union employees, and (4) the Deep South.

Had these groupings been considered by the Administrator under his wide administrative discretion, they would have required a much greater percentage representation on the commitee for the petitioners, who had no representation at all. Their consideration now demonstrates the correctness of Petitioners' contention that a 55% representation on the committee by the South was the minimum required by due regard.

There is no point in designating regions as the North or the South or the New England States, unless there is some basis for thus localizing the segments of the industry carried on in these regions. Here again, the Administrator, in the exercise of his discretion must be guided by relevant factors. Those enumerated in the statute are not made binding, but they serve as a pattern for probable administrative action.

Regions where large mills are located may not be grouped with regions where small mills are located, if size is a competitive factor. If such a grouping is made without giving representation to the small mills, the Congressional purpose of proportionate representation is defeated. The grouping made in the present case aligns these small mills with the largest in the industry, disregards differences in transportation, power, and overhead costs; and ignores entirely the differences in the types of machinery and labor employed. Indeed, as Respondent's argument indicates, these mills

might have fared better had they been represented by the finishing mills of the North, rather than by large integrated mills with all these advantages.

The expression "geographical region" has no legal or well defined meaning. The purpose of Congress was to prevent committee action against a section of the country in which there would be no corresponding benefit. Taking the largest grouping possible, without regard to the different types of mills or the competitive factors involved, demonstrates, not that the Administrator exercised his discretion under the Act, but that he sought to avoid its plain mandate. The Minority Report points out the failure of the committee to give adequate consideration to the factor of living costs (R. 177). Objections made at the hearing charge that no consideration was given to living costs in towns of less than 5000 population (R. 236). Large mills are not located in small towns, since their payrolls are large and necessarily provide a large population for the town. Not one iota of statistical data on the subject of living costs in small towns was prepared or submitted, although a wealth of testimony was presented by Petitioners' (R. 931-2, 1025, 1392, 1434, 1438, 1480-3, 1566-1574, 1642).

Respondent attempts to excuse the action of the Administrator on the ground that representatives of neutral territory were brought in and that the District of Columbia is middle ground. Such treatment does not conform to the statute. Everyone knew that the bulk of the cotton textile industry was located in the cotton-growing states. They knew that thia great section of our country was being referred to as "economic problem Number One", and that it was making a mighty struggle, without the aid of tariffs or other government benefits, to better its condition by balancing agri-

culture and industry. They knew that in this effort the South was processing more and more of its one great money crop, and that this trend was having repercussions in Northern industrial centers. It was this problem that the Administrator set out to solve. His first step was to group the small mills, with tremendous competitive disadvantagts, with the large mills, with which they had to compete; appoint all the representatives of employers from the large mills; reduce the majority region to a minority representation; bring in other fibers so that this would not appear arbitrary; and to roam the country at large for "big names" to make his action look respectable. With the stage thus set, he struck his blow, not at the large new mills which were causing panic in other regions, but at the small mills which had been struggling hardest to overcome their natural handicaps and the discriminations previously imposed.

Thus, it is demonstrated (Br. 21-23) that the Administrator took the geographical regions best calculated to avoid a proper consideration of these Petitioners in the selection of the committee, ignored the purpose of Congress in requiring geographical representations on the committee, violated the express terms of the Act by going outside of the geographical region for a substantial portion of the committee, and denied the largest geographical unit permissible the majority representation to which it was entitled. It is this treatment which respondents undertake to characterize as due regard by ignoring these indisputable facts and contending that due regard implies an administrative discretion. Petitioners do not ask this court to substitute its judgment for that of the administrative officials, but it does ask the court to pass upon the question of whether or not this treatment was "due regard" within the meaning of the Act.

C. The Procedure Before the Industry Committee.

1. *Committee was required to proceed according to law.*

Respondent contends (Br. 47) that petitioners argument "manifests a basic misconception of the statutory scheme" of inter-related activity by the Industry Committee and the Administrator. If petitioners have misconceived the statutory scheme, it was because of their consideration of those parts of the statute which respondent carefully avoids mentioning in that portion of his brief devoted to the sub-head (Br. 47-64). Respondent refers to Section 8 of the Act (Br. 48) in support of his statement that the committee is to "investigate", and "may hear such witnesses and receive such evidence as may be necessary or appropriate to enable" it to carry out its function; but omits to note that the statute in question requires that the committee consider certain relevant factors enumerated as being "among other relevant factors" which the committee is required to consider. Respondent further notes that the Administrator is required to approve the recommendation " 'if he finds' *inter alia* that the recommendations 'are supported by the evidence adduced at the hearing' . . .".

It should be noted that the language for which the facile *"inter alia"* was substituted is as follows: "If he finds that the recommendations are made in accordance with law". Petitioners agree with respondent that the "legislative history of the Act shows that the dichotomy was deliberate". With this in mind petitioners would change the emphasis supplied by respondent in the quotation from the statement of Senator Thomas (Br. 50) to the statement that "on the other hand it insures that no minimum wage rate shall be put into effect by administrative action which has not been found to be in accordance with law by an independent, responsible administrative officer of the Government . . ."

The charge that the committee did not act according to law was first made by the minority committee in its separate report (R. pp. 169 and 177). There is nothing in the report of the majority to refute the charges thus made. It was again made orally before the Administrator at the hearing (R. 234-238). It was again made by written objection filed before the Administrator (See R. pp. 249-252, Par. 7, 8, 11, 12, 14, 15, 17, 18, 23, 24).

Throughout the proceedings before the Administrator the proponents of the Wage Order took the position that the proceedings and conduct of the committee were not pertinent to the inquiry there being conducted, notwithstanding the objections of the minority of the committee and of these petitioners (R. 1084). Notwithstanding the plain provisions of the Act, the Administrator made known his adherence to this view as set out in petitioners' brief. (Br. 36). Notwithstanding the Administrator's view on this question of the interpretation of the Act, the uncontradicted testimony of two witnesses that relevant factors were not considered by the committee appears in the record (R. 890 et seq. and 1088 et seq.).

Subjects which the minority report charge that the committee failed to give consideration are as follows:

> Freight rates.
>
> Taxation.
>
> The economic consequences, in terms of increased purchasing power, of any given minimum wage recommendation.
>
> The effect of reciprocal trade treaties.
>
> The probable effect of the pending cotton export subsidy.
>
> The effect of Government cotton loans on prices and the relationship of these artificial controls to

the problems of the increasing use of substitutes and foreign competition. (R. 169-70)

Living costs.

Annual earnings. (R. 177)

In addition to the foregoing the oral objections dictated into the record raised the question of the sufficiency of the committee's action as to:

The bi-modal character of Southern textile wage structure. (R. 234)

Effect of minimum wages in terms of increased costs, ability to modernize, or in any other relevant terms, upon precisely those establishments which would be most adversely affected. (R. 235)

Cost of living in towns of under 5000 population in which 200,000 textile workers reside.

In response to these challenges to the sufficiency of the committee proceedings, the Administrator found that the Industry Committee:

1. Considered conditions in the industry.
2. Held hearings.
3. Heard numerous witnesses.
4. Received extensive statistical investigations on
   (a) Wage rates
   (b) Cost of living
   (c) Proposed minimum wage rates
   (d) Cost of living in different sections
   (e) Transportation cost differences.
5. Received evidence on
   (a) Collective labor agreement wage rates
   (b) Production costs
   (c) Other factors bearing on minimum wage rates.

All of the foregoing is a part of the record in this case. It is readily apparent that the findings of the Administrator are not responsive to the issues raised by the report of the minority or by the objections filed by these petitioners. Thus, Respondent is reduced to the necessity of either arguing that the requirement that the recommendations be made in accordance with law may be ignored, or that a general finding on this issue may be made by the Administrator without giving attention to specific issues and objections raised.

In the court below respondent did not ignore the plain provisions of the statute as is done here. The contention was made there, as before the Administrator, that if the evidence adduced on the hearing before the Administrator sustained the recommendation of the committee, any defect in procedure would be cured. This error of law pervaded the entire proceedings before the Administrator, and should constitute sufficient grounds for setting aside the order. *Tagg Brothers and Morehead v. United States,* 280 U. S. 420, 442; 74 L. Ed. 524, 536.

In the court below the doctrine of negative orders was relied upon as the reason why the court should not review the holding of the Administrator on the procedure of the Committee. In *Rochester Telephone Corporation v. United States,* 307 U. S. 125, this court said:

> "We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' arders, as a touchstone of judicial jurisdiction to review the commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinctive, they can no longer be guiding." (307 U. S. 143)

It should be noted that while the recommendation of the committee does not finally determine any issue, it does limit the action of the Administrator to an approval or dis-

approval of its terms, and the operative order to be promulgated, and which will affect the industry. He can do no more, or less, than carrying into effect the findings and determinations recommended by the committee. Thus, the procedure of the committee comes within the rule in the Rochester Telephone case, *supra*, and is reviewable because "it will be a final and indisputable basis of action".

2. *Notice and Hearing.*

Petitioners accept Respondent's treatment of the committee proceedings as an admission that no notice was given of committee hearings and reaffirm the contentions previously made with reference to notice. (Br. 44 et seq.). The failure to give notice, the failure to make the investigations desired by the Petitioners, and the unfairness of the committee proceedings with reference to them is amply demonstrated by the record. It is submitted that the "touchstone of jurisdiction to review" the proceedings of the committee is the act itself. The review given by the Administrator was not the finding required by the Act in that it was not responsive to the issues raised by the minority committee report, the oral objections made at the hearing, or the written objections filed with the Administrator. These objections were ignored entirely, and the Administrator confined himself to a holding that the committee procedure was made valid by the statistical data and exhibits furnished by his own establishment.

Respondents' argument that some Southern employers, and as many as three from the Small Mills (Br. 55), actually appeared before the committee, if intended to show that Petitioners were not prejudiced by lack of notice, demonstrates a misconception of what brought this litigation into being. It is true, as stated by Respondent (Br. 54), that most of these Petitioners are members of the American Cotton Manufacturers Asssociation. They relied upon their membership in

this organization for protection against prejudicial committee action. They did not realize that the Association had abdicated in favor of the Cotton Textile Institute. They did know that their association was dominated by the large mills of the Southeast, but they reposed confidence in the leaders and did not believe that they would be betrayed.

However, the American Cotton Manufacturers Association aligned itself with the Cotton Textile Institute, the traditional voice of the large operators, both North and South, and the Association representative was maneuvered into a position of apparently approving the action of the Institute. (R. 1084 et seq.).

No one can doubt that the interest of the larger operators, and thus of the Institute, lie in forcing the smaller mills out of competition. They have no fear of labor costs, provided they can arrange their own prices through the Institute. Dr. Murchison, of the Institute, obtained all that he asked of the committee, as was natural, since his was the dominant voice in its selection (R. 1059). This was all made known to the Administrator before his hearing began (R. 12, 1563), but the dominant voice of monopoly had already been heard, and these petitioners were required to begin the preparation of their case after the committee had reported and disbanded.

Did Congress contemplate any comparable situation when it provided for "due notice of any hearing" in Section 8(g) of the Act?

Hearings were actually held as was contemplated. At these hearings, much was said and done that these petitioners might have disproven and avoided, but they were too busily engaged in the business of operating cotton mills, under the very conditions which required their special consideration, to remain on attendance at meetings which they had a right to assume would be attended by the members of

not of the Administrator, or any other person. The whole document, when reduced to that portion of which the Administrator made use, represents the opinion and conclusion of the author on matters concerning which this record demonstrates that even experts differ.

It is one thing to take judicial notice that visibility was good at a certain time on a certain day by referring to Weather Bureau data on the condition of the weather and the time at which the sun arose, even though the data at hand does not state the ultimate conclusion. The conclusion is reached because the data is known to be accurate and the inference is one of fact within the common experience of all men. In the present case, the data is asserted to be accurate as to only twenty percent of the industry. Beyond that, its accuracy as a representative cross-section is known only to experts, and as to that, the experts may differ. The conclusions are those of one individual, not present, and are contrary to the views expressed by others. While notice may be taken of basic facts within common knowledge, inferences will not be drawn therefrom unless demonstrably correct.

Cases cited by Respondent (Pr. 75, Note 15) are entirely in line with our position. In *West v. Chesapeake P. Teleph. Co.*, 295 U. S. 662, 674; 79 L. Ed. 1640, 1648, notice was taken of Bureau of Labor Statistics publications to show that other material introduced in evidence was not of that character which would support the inference urged upon the court. In *Virginia Ry. Co. v. System Federation No.* 40, 300 U. S. 515, 555; 81 L. Ed. 789, 803, the inquiry was as to what Congress had before it in passing the legislation. No one has contended that Congress is bound by judicial rules of evidence, or that its activities are judicial in nature. The same distinction applies to *National Labor Relations Board v. Pennsylvania G. Lines*, 303 U. S. 261, 267; 82 L. Ed. 831,

834, and in *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 607; 83 L. Ed. 1014, 1019, the inquiry was as to Congressional intent. In *Arizona v. California*, 283 U. S. 423, 453; 75 L. Ed. 1154, 1164, and in *Galveston Electric Co. v. Galveston*, 258 U. S. 388, 402; 66 L. Ed. 678, the references are to historical sources for matters of common knowledge.

While the case here is essentially different from that of *Ohio Bell Telephone Co. v. Public Utilities Com.*, 301 U. S. 292, 300; 81 L. Ed. 1093, 1099, in practical effect, the result is the same. Petitioners are denied an opportunity to make a direct attack on the data accepted by the Administrator. Their only course was to present evidence to the contrary. Since the Administrator turned a deaf ear to such evidence, it must be assumed that he felt bound by statistical findings and the conclusions of the statisticians. To have presented evidence acceptable to him it would have been necessary to take a complete census of the industry and repeat the process from month to month over a period of several years. The nature of the proceeding made this impossible. In the *Ohio Bell Teleph. Co.* case, supra, this court said:

> "It (judiciail notice) does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable . . . Even so, to press the doctrine to the extent attempted in this case, and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial . . . Where price lists, trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them . . . All the more insistent is the need, when power has been bestowed so freely,

their organization. The correctness of our contention (Br. 44 et seq.) is amply demonstrated by the position in which the lack of notice placed these petitioners.

3. *Vote of the Committee.*

Respondents except (Br. 59, Note 26) to the statement previously made that a majority of only one of the three groups on the committee voted for recommendation as made. The accuracy of the statement is not questioned, but it is argued that Mr. Nelson, the chairman, signed the report and must be deemed to have approved it. This assumption, like so many upon which the Administrator based his findings, does not follow from what occurred. In signing the report, the Chairman did no more than he was bound to do in the exercise of the functions of his office. His signing was no more a vote for the recommendation than the certification to to the executive of legislation which has passed, by the presiding officer of a legislative body. The fact remains that the recommendation was made by a majority of only one of the committee groups.

This suggests a further analysis of the committee vote. The two new members, who Respondent assumes read all the evidence and digested all of the statistical data between January 4 and March 21, both voted for the recommendation. If their votes be ignored, the count stood at eleven to six. Of this eleven, seven were employee members, who were interested parties, and had contended for a 40 cent minimum throughout. Thus, the final recommendation had the recorded approval of only two each of the employer and public members of the committee, who had participated in its deliberations.

II

THE ADMINISTRATOR'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Substantial Evidence and Rules of Evidence.

Respondent contends that the absence from the Fair Labor Standards Act of a provision like that in the National Labor Relations Act to the effect that rules and evidence shall not apply, has no significance in this case because of the general rule that administrative bodies are not required to observe the same standards in receiving or excluding evidence as those observed by courts of law.

If the rule be as contended, which is not conceded, it is in conflict with well-known rules of construction. Cases coming before this court during the last few years demonstrate the public demand, if not the actual necessity for some restraint upon the fishing activities of these bodies, and their tendency to accept any matter appearing to serve their purposes, as evidence.

The rules of evidence in administrative procedure as contrasted with the rules and evidence in judicial proceedings are but a refinement upon and adaptation of the body of the law of evidence to the needs and character of administrative procedure. If a line is to be drawn between judicial proceedings and administrative proceedings, it is necessary first to accurately define administrative proceedings. Administrative proceedings may include functions which are judicial, legislative, administrative, and ministerial. They may be confined to one or any combination of two or more of these functions. In determining to what extent the rules of evidence apply, it is necessary to determine whether or not the issue on which the determination is to be made is one requiring judicial, legislative, executive, or ministerial action. Insofar as a determination is judicial, the rules of

evidence must be applied with full force and effect with the possible exception that prejudice may not always be presumed from the admission of incompetent or irrelevant evidence where the same is not made the basis for a finding.

This does not mean that the rules of evidence have been frozen and may not be restated or permitted the elasticity necessary to meet new and ever-changing situations. It means that in judicial determinations by administrative bodies the same limitations are imposed upon administrative action as is imposed upon courts of law. Courts of law should be permitted to look to decisions of this court approving or disapproving administrative acts on the basis of the evidence for rules to be applied in judicial proceedings.

Respondent has cited and quoted from much literature and material attacking the use and application of rules of evidence, both in administrative proceedings and in courts of law. This material is productive of many conflicts in reasoning. Insofar as it undertakes to prescribe rules of evidence for administrative bodies, it is productive of much confusion. In many instances the authors return to the identical results by different methods of reasoning, and reaffirm the soundness of the application of rules of evidence. It seems that the minimum effect of rules of evidence in any administrative proceeding would be that while rules of evidence do not necessarily exclude any particular form or character of evidence, rules which would exclude but for the administrative character of the proceeding, demonstrate that the evidence is insubstantial where the rule is based on, (1) lack of probative force, (2) unreliable character, (3) lack of conclusiveness and opportunity to rebut, and (4) irrelevancy to the issue being tried.

The adoption of such a formula would be far from opening the door to any and all sorts of material which might

be offered as proof. The test is applied when the matter is before a reviewing court upon which the findings of fact by the Administrator, when supported by substantial evidence, become conclusive.

Bulletin 663 was selected as the strongest support for the findings of the Administrator. It is a private study made by Mr. Henrichs, at the request of Mr. Andrews, the Administrator (R. 392). It is not a statistical table gathered and promulgated by authority of law, but is a compilation of data and figures gathered from various sources and brought together to suit the ideas of the author. It is a composite of the work of various other individuals and bureaus, together with the conclusions of the composer. He, alone, determined the weight to be given to the tables submitted to him, or the reports made to him, or the data gathered by him. His was the duty to analyze all of these facts, figures, and fancies, giving to each the shade of weight or meaning which resulted from his own mental slant, and, by argument or other means, to reach the conclusion which satisfied his own mind. And the analyst, the composer, the author, was not present at the trial subject to cross-examination. He was in Europe and was not offered as a witness, despite the fact that the hearing was extended over many weeks.

A glance through this book will show that Mr. Henrichs got his information from many and varied sources; from publications of the Tariff Commission, the Department of Agriculture, the Bureau of Foreign and Domestic Commerce, The Bureau of the Census, the Census of Manufacturers, the Reports of Cabinet Committees, Reports of the Federal Trade Commission and like informal documents from various Government agencies; from books by private authors, like Kennedy's "Profits and Losses in Textiles," (R. 1778) "Survey of

Technological Improvements, etc.", by the Barnes Textile Associates (R. 1814); "The Triumph of Mediocricy in Business," by Horace (R. 1800), an unpublished manuscript by Sommaripa (R. 1813), newspaper publications, and the like. In some instances, (Id. *Supra*), it was confided that the "sources of the estimate confidential" but that the estimate was accepted by the industry.

The author of the treatise superimposed table upon table, attributing to each such weight as he thought it ought to have; he weighed fact against fact, and figure against figure, and arrived at conclusions, the accuracy and weight of which depended upon his own knowledge, his own judgment, and his own scale of values.

The result he produced has one fundamental objection which would rob the conclusion of probative force if there were no other objections: the study is based not on the whole industry, (R. 394), but on a selected group of 244 mills comprising about 20 per cent of the industry. The basis for this selection does not appear except that the mills were thought to be representative. It does not appear where the mills were located, their sizes, the degree of their modernization, the kind of goods manufactured, the kind of cotton used, the class of labor employed. We know nothing about these mills except that those who selected them thought that they were representative. It is not shown even whether any one of the mills was taken from the group known as the southern small mill group, and certainly it does not appear that any one of the petitioners was represented in the cross section sought to be depicted.

It is not necessary to reflect, in the slightest degree, on the integrity, the sense of justice, or the motives of those who did the selecting or made the comparisons. It is inconsistent with fundamental concepts of the principles which

animate Courts that conclusions shall be reached on facts whose weight and worth depend on the innate predilections of those who gathered them. The right to inquire into the source of this information is entirely fundamental, and it was completely denied to these petitioners and to everyone else connected with the case.

Respondent points out that Bulletin No. 663 was used primarily for the detailed statistical information it contained with respect to hourly earnings in various groups of employees and the average wages paid by employers in the cotton textile industry. They then point out that the testimony of petitioners' statistical, Mrs. Mager, was based on her analysis of official figures and on returns to a questionnaire and was at least as incompetent as that to which petitioners object. If it be conceded that Mrs. Mager's testimony, insofar as it was based on the questionnaire, was incompetent for the same reason that Bulletin No. 663 was incompetent, it is interesting to note the divergence between the results obtained by the use of the studies made. This demonstrates the unreliable character and lack of conclusiveness of this type of study. Its unreliable character and lack of conclusiveness must rob it of any probable probative force. Like all other hearsay, it becomes irrelevant to the issue being tried.

Respondent relies upon the case of *United States vs. Los Angeles & Salt Lake Railroad Company*, 273 U. S. 299, 312, for the proposition that data collected by the Interstate Commerce Commission as a part of its function of investigation, constitutes evidence sufficient to support an order if the data are duly made a part of the record. Let it be noted that none of the data contained in Bulletin 663, nor any of the other statistical information, surveys, or analyses, relied upon by the Administrator, were made as a part of this proceeding or by the Administrator or the Industry Committee as a part of their function of investigation.

Both the Act and the nature of the proceedings distinguish the commission proceedings from those here under review. The Interstate Commerce Commission makes its investigation and compiles its data. Thereafter it serves the person to be affected, with notice and gives an opportunity to appear and refute the data, as well as any inference that may be drawn from it. If analogous proceedings had been followed, the committee would have made its investigation and recommendation as to each of these petitioners on the basis of the relevant factors prescribed by the Act. Petitioners would not have been required to go outside their communities to obtain evidence to refute incorrect findings. As the matter stands, they are condemned by averages arrived at from statistics which do not purport to have included their mills. The same distinction applies to the *New England Division Cases*, 261 U. S. 184, 197.

Respondent's contention that petitioners cannot be heard on the admissibility of the statistical data and related information upon which the Administrator based his findings for the reason that they failed to object to its introduction before the Administrator, is in conflict with the contention that administrative bodies are not goverend by the technical rules of evidence. No objection was made to the introduction of this data for the reason that its mere incorporation in the record would not result in prejudice, and would not raise a presumption that prejudice would result therefrom. It becomes objectionable only when it is made the basis of an administrative finding. The objection goes to the finding and the rules of evidence come into play insofar as they determine that the evidence is insubstantial. No opportunity to make such an objection is afforded until the record of the proceedings before the Administrator has been filed in the reviewing court.

B. Judicial Notice.

Respondent contends (Br. 74) that because official publications of the Bureau of Labor Statistics have been judicially noticed by this court, Bulletin 663 should receive like consideration. The reference to the statute authorizes publication of the data and statutes providing the manner in which official documents may be proved, does not demonstrate the materiality of this bulletin nor invest it with any greater probative force. The most that the court has before it by way of judicial notice of an official publication is that such a study was made by Dr. Henrichs and that certain conclusions were arrived at by him. It does not know that these conclusions are correct, or even that the underlying data tends to support such conclusions. Neither does it know that the underlying data is correct, or that it may be appropriate as a basis for the conclusion ultimately arrived at by the Administrator, as contrasted with that arrived at by Dr. Henrichs.

The doctrine of judicial notice is not to be used as an instrument for dispensing with proof of matters concerning which reasonable minds may differ, and if a reasonable doubt exists, it should be resolved against notice. *Brown v. Piper*, 91 U. S. 37; 23 L. Ed. 200. Thus, it is pertinent to inquire of the nature of the fact or conclusion concerning which the court is asked to take judicial notice. Bulletin 663 was made up on a study of twenty percent of the industry. No information is given as to what mills were studied. Will the court judicially know that these mills present an accurate cross-section of the industry as a whole? But the data upon which the Administrator has relied was compiled by the author of this analysis from the information at hand. The author does not explain his methods or the compensating factors used to offset the effect of known trends tending to vary the determinations. The conclusions drawn are those of the author,

that the 'inexorable safeguard' (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan v. United States*, 298 U. S. 468, *Interstate Commerce Commission v. Louisville and N. R. Co.*, 227 U. S. 88. The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant as a minimal requirement . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has been neglected or ignored."

It is submitted that this case comes within the principles announced in the above quoted portion of the opinion of this court.

C. Finding that there would be no Substantial Curtailment of Employment.

Respondent accepts without reservation or limitations the conclusion of the Administrator (R. 190, 302, 309, 313, 341) that in determining what constituted substantial curtailment of employment the matter was to be considered on an "industry basis" and not in connection with individual mills. (Br. 79 et seq.) A portion of Section 8(b), Fair Labor Standards Act, is quoted to substantiate this view. The treatment of this provision of the Act advocated by respondent would create a conflict between Section 8(c) and the portion quoted. Section 8(c) provides:

"The Industry Committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within susch industry the highest minimum wage rate . . . which (1) will not substantially curtail employment in such classification, and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classifica-

tion in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification."

The ambiguity which respondent would have this court read into the Act is easily avoided by noting that the provision of 8(b) with reference to the recommendation for the industry is "the highest minimum wage rates for the industry", the plural of rate being used in subsection(b), whereas the singular is used in subsection(c). Thus it was not contemplated by Congress that the recommendation should be of one wage rate to control in the entire industry, but that a scale of minimum wage rates to be applied by classifications to be recommended by the Industry Committee and approved by the Administrator should be promulgated where the relevant factors justified such classification.

It has already been pointed out that there was no conflict in the testimony of the witnesses as to the effect of the proposed minimum wage rates upon the Small Southern Cotton Mills. Respondent in treating the testimony upon which the Administrator relied, does not challenge this but proceeds to the same argument followed by the Administrator that the statistical data before him would not justify a classification for the South as a whole as defined to include the Southeastern states.

1. *Small Mills.*

It is not incumbent upon the petitioners to delineate the classification which should have been made by the committee; however, the necessity for such a classification is demonstrated by the uncontradicted testimony of petitioners' witnesses. The competitive position of the small cotton mills located in South Georgia, Mississippi, Alabama, Louisiana and Texas, as contrasted with the mills located in the Caro-

linas, Virginia and points further North, demonstrate that this group was entitled to special consideration at the hands of the committee and the Administrator. The application of the argument used by the Administrator, which had reference to the large integrated mills of the Carolinas, and his disregard for the direct and uncontradicted testimony of these petitioners, is the unfair treatment and unjust discrimination against which petitioners complain. If any weight be given to Bulletin No. 663 and like documents, let it be remembered that insofar as the petitioners and mills similarly situated are concerned, their position is buried in the total of a much larger and more numerous group, so that insofar as their situation is reflected at all they are grouped with the most favored classification in the industry. This is evidenced from respondent's reference (Br. 82) to the showing that the great bulk of the workers were employed in mills where the average wage exceeded thirty-two and one-half cents per hour. A parenthetical statement is made that 85% of these are in the South. By taking averages weighted by the inclusion of the larger mills and those already paying a high average wage, without regard to the minimum, the conclusion is reached that no substantial curtailment of employment will result from the adoption of the recommended wage.

No extended argument is required to show that the evidence upon which this conclusion is based is not substantial. Whether the evidence be received as primary proof, an exception to the hearsay rule, or by judicial notice, it shows that there will be substantial curtailment of employment in a definable group in the industry. That this definable group is susceptible of classification is demonstrated by the testimony of various witnesses as to the extent of unemployment which would result in mills coming under their supervision and operation. The inconclusiveness and inapplicabil-

ity of the statistical data and testimony based thereon is demonstrated by the testimony of Mrs. Mager, based on a similar survey and statistical data, to the effect that the unemployment in this relatively small portion of the industry would amount to more than 20,000 to 25,000 workers displaced (R. 1561).

The Administrator devotes (R. 309-313) four pages to his finding on this subject. Counsel evidently conceives that it needs considerable bolstering because they devote considerable space to a defense of this finding. The Administrator based his finding (in addition, of course, to the ubiquitous Bulletin Six Six Three) on testimony which he attributed to four witnesses—Mr. Battle (R. 555), Mr. Jennings (R. 1157), Mr. Lynch (R. 1413), and Mr. Miller, (R. 1435). The last three appeared in opposition to the establishment of the 32½ cent minimum, and were definite in their statements that they did not feel that they could operate successfully if it should be approved. Evidently, the Administrator cited those three mainly to show that they were paying minimum wages somewhere near the 32½ cent level.

It must be conceded that the witness, Battle, did say that his mill could weather the storm if this minimum wage should be approved. A glance at his testimony, therefore, would be advisable. (R. 555 et seq) Acting at the behest of his northern owners, he had busied himself to try to get an expression from other mills that they did not oppose this minimum. No one has ever contended that the larger mills of the Carolinas did oppose it, so his hearsay evidence with respect to those has no point.

Leaving out of view that his was a hydro-electric plant with water power acquired "several generations ago," (R. 566), it is clear that he would not be adversly affected, to any extent, by a minimum of 32½ cents an hour because his

minimum was already practically at that point, only two learners getting less than 31½ cents per hour. We are ready to admit that his rather large mill would not be appreciably affected by the order, and we admit further that he and his northern associates evinced a desire for the approval of this minimum. We do not admit, however, that his evidence has any probative force whatever on the effect this minimum would have on the small mills of the deep South, to which group these petitioners belong. He knew nothing about them, and did not even hazard a "guess' as to what would befall them. The Administrator had no right, therefore, to consider his evidence at all as weighing on the result which would come to these petitioners and the group to which they belong.

Respondent further undertakes to weaken the culmitive effect of petitioners' testimony by statements found in the record that "small mills" and "marginal mills" were not synonymous terms. That small mills could modernize their equipment and avoid the calamity of having to close as a result of this wage increase, and that employees displaced by this wage increase might reasonably be expected to find employment in other mills. The fact, if it be a fact, that small mills are not marginal mills does not prove that the mills of these petitioners do not operate at a tremendous competitive disadvantage as compared with the larger, more efficient and more modern mills located near their markets. But if it be admitted that all of the mills should modernize to the extent of reducing the number of employees necessary to compensate for the wage increase for those retained, the record demonstrates that the displacement would be substantial. As to employment in other mills, the record shows that the mills of these petitioners are located in small towns and that the employees came from the farm to learn to operate the machinery in these particular mills. That

they would be acceptable to larger mills is a mere reflection of the optimism of the Administrator.

2. *Regional Classifications.*

The Act plainly provides that the Committees shall not make a regional classification simply because there is a region. There is not the slightest inhibition, however, against assigning a classification to a geographical area, if it is found that such an area is entitled to it under the factors prescribed—transportation, living and production costs, and the like. It is only on this basis that we make any contention at all that the South, or more accurately, the region of the small mill group, has made a showing entitling that group to a differential. As far as this litigation is concerned, of course, that contention relates to the situation of the petitioners.

Both the Committee, the Administrator, and Counsel protest against classifications because they conceive that it would be extremely difficult to arrive at a fair classification. Even if that should be true, there would be no sound reason for denying these petitioners, and others in the industry, that which the law gives them.

Evidently, however, this is not true. It is conceded that definite classifications existed at the effective date of the wage order and have existed throughout the entire history of the industry. Could not those who administer this Act, with the apparently unlimited resources in the way of statisticians, and the like, study out the various segments of the industry and find the classes or groups into which they had been arranged by nature at the inception of this law, and make classifications on that basis? Our untutored minds do not enable us to determine whether such classifications would depend primarily on geographical location, climate, size of community, or a combination of all these, and many other factors. Nature has fashioned this industry, however, ac-

cording to well-defined lines, and people skilled in doing such things could certainly discover the factors which had collaborated in producing the resulting status; and having discovered, could arrange differentials accordingly.

If the Administrator and his Committee should find difficulty in making classifications, they could well be referred to those in the same department engaged in administering the Walsh-Healy Act. We note from the Record, page 1479 that eight industries seem there to be divided into five areas for purposes of establishing differentials. We do not suggest that this is a proper classification, but it is one made by an agent of the Secretary of Labor, with duties corresponding to those of the Administrator. Perhaps some refinements of that classification might work.

Do we not have here a clear recognition by the Labor Department of the fact, and of the determining force, of differentials? Suppose, under that law, the Government were advertising to purchase a certain amount of iron and steel. Bids would be filed by representatives of that industry from the various sections. The Government would not entertain a bid unless the wage scale fixed by it should be observed. In presenting bids for the very same contract, a bidder in the South would agree to pay his workers a wage of 45 cents; in the Midwest, he would pay 58.5 cents; on the West Coast, he would be bound to observe a 60 cent wage, and in the remaining states, the wage item would be 62½ cents. There is a definite recognition that the other existing factors (i. e. differentials) will work in conjunction with the wage factor to produce a parity of economic situation, which will enable industrialists in the various sections to contest on a relatively equal footing.

Apparently, also, the W. P. A. has not had any trouble arriving at differentials. The schedule appearing at Page 21

of the record seems to indicate that somebody has applied some scientific knowledge to geographical regions as related to sizes of communities, and has worked out a schedule there which is supposed at least to take into consideration all of the factors involved. If we were disposed to ask the Court to resort to the informality of judicially noticing what transpires in Congress, we might advert to the analysis made a few days ago by Senator Bailey of the distribution of some Eleven Billion Dollars the Government has passed out in recent years. In apparent recognition of classifications which nature had made, the Government through its various agencies, had distributed an average of $58.00 per capita in the South, $96.00 in some other region, and $100.00 in still another. Is it possible that Congress meant for this Committee and the Administrator to be blind to what all other agencies of the Government plainly see and act in recognition of?

3. *Experience under the Act.*

Respondent also attempts to bring into the record the census of manufacturers to show that the activity in this group has not been reduced since the adoption of the wage order (Respondent's Appendix B, page 75). Respondent states in his note (Br. 84): "The census of manufacturers for 1937, pages 286, 287, shows only twelve textile mills employing less than 1% of the workers in the industry in Mississippi. At least six of these mills were protected against compliance with the 32½c minimum wage by the stay granted in this case". Here again is a gross misapplication of this statistical data. Respondent ignores entirely the fact that Mississippi is the only state in which no large textile mills are located. He calls attention to the fact that one-half of the mills located in Mississippi were protected by the stay order granted in this case, but fails entirely to give any weight to this fact. A correct interpretation of the data is

that Mississippi being the only state without large mills, is the only state representative of the Small Southern Mill Group. Since half of mills in Mississippi were protected by the stay granted in this case, the decline in employment reflected by the statistics must have been twice as great for mills not so protected. Since this decline in employment is the only figure that is representative of the effect of the wage order upon the small textile mills of the south, if the statistics show anything at all, they show a tremendous reduction in employment has resulted from the adoption of the wage order. The decline in Mississippi was from an index figure of 53.4 in September 1939 to 40.4 in October 1940. This shows a decline of roughly 26%, which, when increased by virtue of the fact that half of the mills were operating under the protection of the stay order in this case, amount to a total reduction in employment of 52%.

We do not concede that we are required to accept the statistical method of calculation nor that this method of calculation can possibly present an accurate picture of the problem. Neither do we concede or urge that it was proper for respondent to bring in matter not presented to the Administrator, and not included in the record in the court below.

D. Administrator's Finding that Classifications are not Required, not Supported by Substantial Evidence.

Petitioners reiterate that under the evidence in this record the establishment of the uniform minimum wage rate for the entire nation was not in conformity with Section 8 of the Act. The error committed by the Administrator and persisted in by Respondent is the application of the term "substantial curtailment of employment"—to the nation as a whole. (See supra, page 24).

The fact, if it be a fact, that upon the enforcement of the uniform minimum wage recommended, there will still be a wage differential between the North and the South, does not ameliorate the disadvantages of these petitioners which entitles them to a differential.

As to transportation costs, Respondent ignores the disadvantageous position of these petitioners because of the time element involved. This is an important consideration, and was entitled to as much weight as the actual difference in transportation costs.

There is no evidence whatever in the record that these petitioners shipped direct to a consumer market. None of the mills here represented are integrated mills that produce finished products. Respondent does call attention to the fact that a great quantity of the Southern product is finished in Northern mills. This should emphasize the disadvantage of these petitioners in their competition with the Southeastern states.

On the question of living costs, Respondent follows the general pattern set by the Administrator (R. 321-6). Reference is made to the testimony of witness Tolles (R. 451-6). The testimony of this witness was based upon a study made and complied from statistics, and comes within the class of insubstantial evidence which we have previously discussed. The fact is that in making his finding on the costs of living the Administrator relied on his bulletins eleven times, while he referred to the testimony of the witness Adamson five times. Of course the testimony of Adamson provides no support for the conclusions of the Administrator since it is in conflict with them.

The Administrator places much reliance upon his finding (R. 338) that taxes are higher in the North than in the South. The record does not support this conclusion. The va-

rious tax rates recited in the Administrator's finding are nowhere substantiated by substantial evidence, and the finding of the Administrator seems to be based on the statement of Donald Comer. Mr. Comer was asked if he was aware that the tax receipts for certain states were certain amounts per capita for the year 1937. His response was (R. 981): "All I know of that is that the chances are that the per capita wealth in the representative states that you have mentioned would show a larger difference than in the per capita taxes in other places." Mr. Comer testified positively that the differences in per capita wealth in the two regions made the burden heavier for the textile mills. This testimony was ignored entirely by the Administrator, and he proceeded to his arbitrary conclusion that a per capita tax rate correctly reflected the tax burden of the industry, notwithstanding the fact that the per capita rate would include income taxes, manufacturers' sales taxes, licenses, and other forms of taxation, in addition to the fact that advalorem taxes are assessed on the basis of property valuation and not at a per capita rate. It should not be necessary to mention to this court that per capita tax rates bear no relationship whatever to the amount of taxes required of an industry in the locality where the rate is established.

Respondents question (Br. 107) our previous contention that the labor employed by the small mills of the Deep South was less productive than that of the North and East. He cites numerous witnesses to the effect that there was no difference in the efficiency of the employees in the two sections. Here again no distinction is made between these petitioners and the large mills of the South Atlantic states. The witnesses relied upon are Russell T. Fisher, President of the National Association of Cotton Manufacturers, Samuel Powell of Warwick, Rhode Island, Paul R. Christopher of Charlotte, North Carolina, Donald Comer of Birmingham,

Dr. Gus Dyer, Robert R. West of Danville, Virginia, and J. E. Sirrine of Greenville, South Carolina.

The testimony of Donald Comer does not support the conclusion for which it is cited (R. 977). The testimony of Dr. Dyer is directly at variance with the conclusion. His testimony was that in New England where skilled workers, bred to the trade, were employed a higher rate of productivity was obtained than in the South where unskilled farm hands had been brought in and taught the rudimentary functions required in the operation of a machine.

Robert D. Sanders testified (R. 1575), as follows:

> "The employees and operatives in the cotton mills in the Northeastern part of the United States are on the whole more skilled and more efficient than are the employees and operatives employed in our mills.
>
> "The employees in our mills are largely recruited from the farm districts in and around our mills, and are not on the whole experienced cotton mill operatives. Furthermore, a large number of them go back to the farm during the crop season.
>
> "These people that work in our mills are people that have lived for generations right around that community, in that vicinity, and have not been imported in there from the large textile centers, and they come in and learn and work there, and they are not naturally mechanics, and they don't run as many machines as the operatives do in the large textile centers."

Paul A. Redmond (R. 1649) testified that because of lack of experience the employees in his mill were not as skilled and efficient in their work as employees generally employed by Northern mills.

III

THE FAIR LABOR STANDARDS ACT IS UNCONSTITUTIONAL

Before answering the argument set out in Petitioner's Brief, we wish to point out that the record here, although built up for other purposes, demonstrates the unconstitutionality of this Act.

A. Interstate Commerce.

The contention of Respondent that the Commerce Clause opens the way for control by the Central Government when the problem is one involving activity for profit, bears a close similarity to corresponding activities in other states, and is beyond the power of the individual states to control, must fall of its own weight. Petitioners do not abandon the fundamental concept of commerce as being intercourse and traffic connected with movement across state lines. This Court has recently pointed out a distinction between contracts which are closely related to commerce, and contracts which are local in character, the determinative fator being the difference in services rendered by stevedores and longshoremen. *Puget Sound Stevedoring Co. v. Tax Commission,* 302 U. S. 90; 83 L. Ed. 68. The Court, in that case, distinguished the case of *New York ex rel. Pennsylvania Ry. Co. v. Knight,* 192 U. S. 21; 48 L. Ed. 325, in which it was held that a contract by an interstate carrier for the transportation of its interstate passengers to and from its terminus, the service being "contracted and paid for independently of any contract or payment for interstate transportation was not commerce". 302 U. S. 93.

The interpretation of the Commerce Clause contended for by Respondent would not stop at overturning the case of *Hammer v. Dagenhart,* 247 U. S. 251; 62 L. Ed. 1104; but would cancel out so much of the jurisprudence of the Nation

as has attempted any differentiation between what is local and what is National. The test of what is "close" or "direct", as used in the case of *Santa Cruz Fruit Packing Co. v. National Labor Relations Board,* 303 U. S. 453, 466; 82 L. Ed. 954; implies that there must be some concept to which the proximity can be related, and something tangible toward which the activity can be directed. Any other concept must open the door to the imposition of the individual preferences of the judges denounced by Respondent (Br. 26.)

B. Due Process of Law.

As stated above, the record in this case demonstrates the unconstitutionality of the Act. The Committee assumed (R. 190) that its action would destroy the value of some mills. The Administrator conceived his duty to be to inflict this loss upon those who could not survive his action (R. 303, 309, 313). Respondent accepts this concept as a matter of course. (Br. 80 et seq.) The purpose of this activity is to provide more pay for a smaller number of workers.

Mr. Justice Brandies, in passing on the validity of the first Frazier-Lemke Act, took a different view from that assumed by the proponents of this order. In *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 600; 79 L. Ed. 1593, 1610, he said:

> "We have no occasion to consider either the causes or the extent of farm tenancy; or whether its progressive increase would be arrested by the provisions of the Act. Nor need we consider the occupations of the beneficiaries of the legislation. These are matters for the consideration of Congress; and the extensive provision for the refinancing of farm mortgages which Congress has already made, shows that the gravity of the situation has been appreciated. The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied

> has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. . . . As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

Respondents question the applicability of the *Morgan* cases to the case at bar. In *National Labor Rel. Bd. v. Mackay Radio and Telegraph Co.*, 304 U. S. 333, 351; 82 L. Ed. 1381, 1393, this Court said:

> "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights."

Petitioners are before this Court asking protection of their substantial rights.

Petitioners submit that the record in this case does not sustain the action of the Administrator, under the terms of the Act; and that under the limitations imposed by our constitutional form of government, the Act is unconstitutional.

BEN F. CAMERON,
W. GORDON McKELVEY,
LESTER E. WILLS,
Attorneys for Petitioners.